BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-316-C - ORDER NO. 2005-247

AUGUST 1, 2005

IN RE:	Petition of BellSouth Telecommunications, Inc. to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.	))))	ORDER ADDRESSING PETITION FOR EMERGENCY RELIEF

This matter comes before the Public Service Commission of South Carolina (the Commission) on a Petition for Emergency Relief submitted by Nuvox Communications, Inc., Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Spartanburg, LLC, KMC Telecom III, LLC, and KMC Telecom V, Inc. (collectively, the CLEC Petitioners) on March 2, 2005, and a related letter from ITC^DeltaCom Communications, Inc. submitted to the Commission on February 23, 2005. This Order also disposes of the Emergency Petition filed by Amerimex Communications Corp. filed on March 4, 2005, and the similar letter filed by Navigator Telecommunications, LLC submitted on March 3, 2005. Amerimex subsequently withdrew its Emergency Petition.

The CLEC Petitioners request that this Commission grant the following relief: (1) declare that the transitional provisions of the Triennial Review Remand Order (TRRO) issued by the Federal Communications Commission (FCC) on February 4, 2005, are not self-effectuating, but rather are effective at such time as the parties' existing

interconnection agreements are superseded by the interconnection agreements resulting from their upcoming arbitration docket; and (2) declare that the Abeyance Agreement that they entered into with BellSouth Telecommunications, Inc. requires BellSouth to continue to honor the rates, terms and conditions of the parties' existing interconnection agreements until such time as those agreements are superseded by the agreements resulting from the upcoming arbitration docket.

The Commission has carefully reviewed the record in this matter, including the filings of the parties and the transcript of the oral argument presented, along with the controlling law. Guided by this Commission's duties under State law, the express terms of the TRRO, including its findings regarding public policy and the public interest, and based on this Commission's reading of the TRRO that the Federal Communications Commission (FCC) envisioned that the changes of law would be administered through an orderly process under State Commission supervision, we hold that the CLEC Petitioner's request for relief should be granted in part and denied in part as described herein.

We hold that, after June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order an Unbundled Network Element (UNE) from BellSouth and pay the Total Element Long Run Incremental Cost (TELRIC) rates for that item in regard to new customers seeking switching and high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90 day period is provided only for orderly negotiation and

service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

We also hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable).

Further, we hold that if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.

Lastly, we hold that the scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC Petitioners' Petition. Therefore, it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief. Further, where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation

that the parties will move expeditiously away from the specified UNE framework. In addition, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

A further explanation of our holdings follows.

I. NEW CUSTOMERS SEEKING SWITCHING, AND CERTAIN OTHER UNEs

We had instituted a deadline of June 8, 2005, as the date when CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. Again, this 90 day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

First, we agree with some 11 other State Commissions, which, as of April 15, 2005, had held that the TRRO does not permit new UNE orders of the above-noted facilities. The TRRO states repeatedly that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. This includes switching (TRRO, paragraphs 204, 227), and certain loops and transport (TRRO, paragraphs 142, 195).

The CLEC Petitioners stated a belief that TRRO, paragraph 233 requires BellSouth to follow a contractual change-of-law process before it can cease providing

these facilities. The paragraph, however, is clear that carriers must implement changes to their interconnection agreements consistent with the FCC's conclusions in the TRRO. Further, we agree with the New York Commission, which stated that "Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005." Thus, the right to assert contractual obligations must be read congruently with one of the overall goals of the TRRO, which was that certain classes of UNEs were no longer to be made available after March 11, 2005, at TELRIC prices.

Although we recognize that our conclusion with regard to new customers and new UNEs may be contrary to certain interconnection agreements, we believe that the FCC has the authority to make its order effective immediately regardless of the contents of particular interconnection agreements. Clearly, the FCC may undo the effects of its own prior decisions, which have been vacated by the Federal Courts on several occasions. The FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition." TRRO, paragraph 2. In addition, the South Carolina Supreme Court has held that the right to contract is not absolute, but is subject to the state's police powers which may be exercised for protection of the public's health, safety, morals or general welfare. In Anchor Point, et al. v. Shoals Sewer Company and the Public Service Commission of South Carolina, 308 S.C. 422, 418 S.E. 2d 546 (1992), the Court held that where a matter affected the public interest, the Commission, exercising the State's police powers, could issue an order which altered a

master deed. Clearly, under the police power, this Commission can alter interconnection agreements if a matter of public welfare is involved. Since the FCC determined that the UNE Platform harms competition and is therefore contrary to the public interest, we believe that this Commission may modify interconnection agreements at least to the degree that said agreements may be read to require BellSouth to offer new UNEs to new customers.

Further, in keeping with our desire to bring about an orderly transition period, we have held that after June 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This is a 90-day extension of time from the TRRO-imposed March 11, 2005, deadline for orderly negotiation and service transition purposes. However, we emphasize that any new rates agreed upon between parties for these services will be subject to true-up back to March 11, 2005, based on the new contractual arrangements negotiated by the parties. Thus, the new rates will be consistent with the intent of the TRRO not to allow availability of new adds to new customers after March 11, 2005.

II. EMBEDDED BASE OF EXISTING CUSTOMERS

We hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March

10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable). (TRRO, paragraphs 227, 228, 145, 198)

Paragraph 228 of the TRRO states that unbundled access to local circuit switching during the transition period should be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar. With regard to the transition pricing of unbundled dedicated transport facilities for which the FCC determines that no Section 251(c) unbundling requirement exists, according to paragraph 145 of the TRRO, such facilities shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that transport element. Paragraph 198 of the TRRO adopts, for transition pricing of unbundled high-capacity loops for which the Commission determines that no Section 251 (c) unbundling requirement exists, a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that loop element.

The TRRO states as its reasoning that moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while

at the same time, these price increases, and the limited duration of the transition provide significant protection of the interests of incumbent LECs in those situations where unbundling is not required. TRRO, paragraph 198. We believe that the same reasoning is appropriate for our use of this transition pricing mechanism, and we hereby adopt the TRRO reasoning as stated.

III. REASONABLE DILIGENCE

Again, if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for by its interconnection agreements. TRRO, paragraph 234.

IV. ABEYANCE AGREEMENTS

We do not believe that the Abeyance Agreement offers the CLEC Petitioners an alternative method of relief in this case. The CLEC Petitioners and BellSouth are parties to an Abeyance Agreement that provides in part:

> Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by USTA II, as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion.

> Additionally, the parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to USTA II and its progeny.

The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Agreement says nothing of changes of law that might be mandated by the FCC in the TRRO. In other words, adopting the Joint Petitioners' argument would require this Commission to find that the scope of the Abeyance Agreement was so wide that, even though the TRRO proceeding is never mentioned in the Agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the current Agreement even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results. Accordingly, the Abeyance Agreement provides no alternative remedy for the Joint Petitioners in the present case.

CONCLUSION AND ORDER

Because of the reasoning stated above, we hold that:

1. After June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking

switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90-day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties;

2. The transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e., TELRIC rates + $1 or 115% as applicable);

3. If a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements; and

4. The scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC's Petition; therefore it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief.

5. Where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation that the parties will move expeditiously away from the specified UNE framework. Further, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice-Chairman

(SEAL)